Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

COMMENTS OF THE MIDWEST ASSOCIATION OF COMPETITIVE COMMUNICATIONS, INC.

Pursuant to the Public Notice released by the Federal Communications Commission ("Commission") on February 15, 2013, [1] the Midwest Association of Competitive Communications, Inc. ("MACC") files the following comments in support of Ad Hoc Telecommunications Users Committee *et al*.'s November 2, 2012 Petition[2] requesting that the Commission reverse forbearance from dominant carrier regulation and certain *Computer Inquiry* requirements granted to Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest (collectively "Verizon *et al*.") in their provision of non-TDM-based special access services.

I. INTRODUCTION

MACC is an association of 12 CLECs formed to foster competition in the communications industry in the Midwest as well as portions of the Southwest by participating on

1 Wireline Competition Bureau Seeks Comment on Petition to Reverse Forbearance from Dominant Carrier Regulations of Incumbent LECS' Non-TDM-Based Special Access Services, WC Docket No. 05-25 & RM-10593, Public Notice, DA 13-232 (W.C.B. rel. Feb. 15, 2013).

2 Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom ("Petitioners") to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-based Special Access Services, WC Docket No. 05-25, RM-10593 (filed Nov. 2, 2012) ("Petition").

behalf of its membership in the regulatory and legislative process. MACC also creates public forums to educate officials and the public about the economic and social benefits of competition. MACC members supporting this filing include Cbeyond Communications, LLC; EarthLink, Inc.; First Communications, LLC; MegaPath Corporation; Socket Telecom LLC; TDS Metrocom LLC; tw telecom inc.; and XO Communications, LLC (collectively "MACC Members").

The Commission's *Forbearance Orders* have permitted *Verizon et al.* to offer non-TDM-based special access services at any rates, terms and conditions that they choose. But because they remain dominant providers of non-TDM-based special access services, the Commission's deregulation of these services will allow Verizon *et al.* to harm or otherwise impede competition rather than promote it. As Petitioners explained, while DS1 and DS3 special access services traditionally comprise the vast majority of the special access services that serve businesses across the nation, non-TDM-based special access services, such as Ethernet, are replacing DSn services. Over time, Ethernet and other non-TDM-based special access services will be the primary means by which businesses in this country transmit information. But where this is now happening, as a result of the *Forbearance Orders,* competition and competitive pricing are being harmed by the unreasonably high prices and anticompetitive conduct of Verizon *et al*.

While MACC Members offer different competitive services, a united belief among them is that a vibrant, open market encourages companies of all sizes—big and small—to offer better service, provide the lowest possible prices, and roll out innovative products. To maintain a competitive policy that will drive innovation as we transition networks to new technologies, the MACC Members support the Petition as explained below and encourage the Commission to grant it as proposed by Petitioners.

II. THE COMMISSION SHOULD GRANT THE PETITION

A. The Commission's decisions granting Verizon *et al.* forbearance from dominant carrier regulation of non-TDM-based special access services should be revisited

1. The Commission has an obligation to revisit the *Forbearance Orders* and the authority to reverse them

As the Petitioners explained,[3] the Commission has the authority to reverse its decisions that granted AT&T, legacy Embarq, Frontier, and legacy Qwest forbearance from dominant carrier regulation of their non-TDM-based special access services.[4] This includes Verizon's deemed granted decision, which "may be subject to a less stringent standard."[5]

The Commission's *Forbearance Orders* are "not chiseled in marble."[6] They can be revisited and reassessed as the Commission reasonably sees fit "based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area."[7] The Commission need not demonstrate "to a court's satisfaction" that a new policy is "*better*" than the old one.[8] Rather, "it suffices that the new policy is permissible under the statute, that there

---

[3] Petition at 21-24.

[4] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶¶ 1 & 12 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, et al.*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, ¶¶ 1 & 12 (2007) ("*Embarq & Frontier Forbearance Order*"); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260, ¶¶ 1 & 13 (2008) (collectively, the "*Forbearance Orders*").

[5] Petition at 22. *See* Verizon Telephone Companies' Petition for Forbearance from Title II and *Computer Inquiry* Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006).

[6] *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009).

[7] *Id*.

[8] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original).

are good reasons for it, and that the agency *believes* it to be better."[9]

More importantly, the Commission has an obligation to revisit and reverse its prior forbearance orders "in accordance with its continuing obligation to practice reasoned decisionmaking."[10] As the Petition demonstrates, the *Forbearance Orders* are inconsistent with the Commission's current policy as reflected in the *Phoenix Forbearance Order*[11] and therefore, the *Forbearance Orders* must be revisited and reversed.

2. The traditional market power test that the Commission applied in the *Phoenix Forbearance Order* should be used in determining whether to reverse its orders granting forbearance

Unlike the "nationwide" marketplace analysis that supported the Commission's *Forbearance Orders*, the Commission applied the traditional market power analysis in the *Phoenix Forbearance Order*, "similar to that used by the Commission in many prior proceedings and by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in antitrust reviews."[12] In so doing, the Commission "separately evaluate[d] competition for distinct services, for example differentiating among the various retail services purchased by residential and small, medium, and large business customers, and the various wholesale services purchased by other carriers."[13] It "also considered how competition varies within localized areas in the Phoenix market."[14]

As the Petition explains, the traditional market power analysis employed in the *Phoenix Forbearance Order* is "far more precise, accurate, and reliable than the 'abbreviated analysis'

---

9 *Id*. (emphasis in original).

10 *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991).

11 *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) ("*Phoenix Forbearance Order*"), *aff'd, Qwest Corp. v. FCC*, No. 10-9543 (10th Cir. Aug. 6, 2012).

12 *Phoenix Forbearance Order*, ¶ 1.

13 *Id*.

14 *Id*.

used in the *Forbearance Orders*."[15] The abbreviated nationwide analysis conducted in the *Forbearance Orders* suffered from numerous infirmities,[16] whereas the traditional market power analysis used in the *Phoenix Forbearance Order* was based on sound economic principles that were "well-designed to protect consumers, promote competition, and stimulate innovation."[17]

Given the shortcomings of the nationwide analysis supporting the *Forbearance Orders* and the fact that the analysis contravenes current Commission precedent, the Commission should revisit these orders and assess whether they should be reversed. In making such a determination, "to reverse a forbearance decision, the Commission must find that at least one of the [Section 10 forbearance] criteria is no longer met."[18]

Accordingly, if the Commission determines after applying the traditional market power test that dominant carrier regulation of ILEC non-TDM-based special access services is (1) necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions for such services; (2) necessary to protect consumers of such services; OR (3) consistent with the public interest, the Commission must reverse the forbearance relief it granted in the *Forbearance Orders* as well as the forbearance relief that Verizon was granted by operation of law.[19]

In applying the traditional market power test, MACC Members urge the Commission to follow the Petitioners' proposal on how to (1) define the relevant product markets; (2) define the relevant geographic markets; (3) identify the market participants; (4) assess the extent to which ILECs face actual competition; (5) assess the extent to which ILECs face potential competition; (6) assess the extent to which customers are willing and able to switch from the ILECs' non-

---

[15] Petition at 25-26 (footnote omitted).

[16] *Id*. at 26-27.

[17] *Phoenix Forbearance Order*, ¶ 3.

[18] *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd 7866, ¶ 98 (2010).

[19] Petition at 25.

TDM-based special access services to a non-ILEC's non-TDM-based special access services (*i.e.*, elasticity of demand); and (7) assess the extent to which ILECs' advantages in cost structure, size, and resources as compared to their competitors are strong enough to preclude effective competition.[20]

B. Application of the traditional market power test likely will show that the ILECs that obtained forbearance relief are dominant in the provision of non-TDM-based special access services and that dominant carrier regulation should be reimposed on them

If the Commission revisits the *Forbearance Orders* and applies the traditional market power test, it should find that the ILECs that obtained forbearance relief must be treated as dominant in the provision of non-TDM-based special access services. These ILECs remain dominant because they have a monopoly over last mile facilities that serve a large number of business customers in the U.S. The record demonstrates they are exploiting this market power and, in contravention of Section 10, harming competition by (1) setting prices for non-TDM-based special access services well above the available measures of costs and thereby forcing competitors into a classic price squeeze; (2) maintaining wholesale prices that are high relative to retail prices so as to limit competitors' addressable markets; and (3) utilizing restrictive provisions in special access volume and term plans to limit the extent to which competitors can upgrade existing DS1 and DS3 special access circuits obtained from ILECs to more efficient Ethernet special access circuits.[21]

As the Petitioners propose,[22] the Commission should address the market power of these ILECs in the provision of non-TDM-based special access services in two related steps. First, the Commission should reverse its *Forbearance Orders.* Second, to prevent ILECs from exploiting their dominance in the provision of non-TDM-based special access services, the Commission should apply pricing and tariffing regulations that are similar to those that currently apply to

[20] *Id*. at 4-7 & 30-56.

[21] *Id*. at 8 & 57-58.

[22] *Id*. at 59.

TDM-based special access services for which ILECs have market power. The Commission should also adopt appropriate regulations concerning service quality for non-TDM-based special access services that ILECs must tariff.

Adopting such regulations will ensure that ILECs offer non-TDM-based special access services at rates and on terms and conditions that are just and reasonable and not unjustly or unreasonably discriminatory, as Sections 201(b) and 202(a) of the Act require.[23] The goals of Section 706 of the 1996 Act will also be advanced by adopting these regulations because competitors will be able to expand the size of their addressable markets to include locations that they cannot serve today due to high ILEC wholesale prices for non-TDM-based special access services.[24] Non-ILECs will then be able to serve more multi-location customers and to deploy fiber to such customers' multiple locations, including their high-demand locations.[25] As a result, businesses, anchor institutions, and the U.S. economy as a whole will be the ultimate beneficiaries of such regulations.[26]

III. CONCLUSION

For the foregoing reasons, the Commission should grant the Petition by revisiting and reversing the *Forbearance Orders*, including the forbearance relief Verizon obtained through

---

[23] Petition at 8.

[24] *Id.*

[25] *Id.* at 8-9.

[26] Petition at 9.

operation of law, and adopting the regulations Petitioners propose that will promote competition in non-TDM-based special access services.

Respectfully submitted,

MIDWEST ASSOCIATION OF COMPETITIVE COMMUNICATIONS, INC.

*/s/ Philip Macres*________
Andrew D. Lipman
Philip J. Macres
Bingham McCutchen LLP
2020 K St., NW
Washington, D.C. 20006
Tel.: (202) 373-6000
Fax: (202) 373-6001
andrew.lipman@bingham.com
philip.macres@bingham.com

Counsel for the Midwest Association of Competitive Communications, Inc.

Dated: April 16, 2013